

## Sustainable Development Law & Policy

---

Volume 12

Issue 2 Winter 2012: *Climate Law Reporter*

Article 3

---

# Unconstructive Ambiguity in the Durban Climate Deal of COP 17 / CMP 7

Remi Moncel

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/sdlp>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Moncel, Remi. "Unconstructive Ambiguity in the Durban Climate Deal of COP 17 / CMP 7." *Sustainable Development Law & Policy* 12, no. 2 (2012): 6-11, 52-56.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Sustainable Development Law & Policy* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# UNCONSTRUCTIVE AMBIGUITY IN THE DURBAN CLIMATE DEAL OF COP 17 / CMP 7

by Remi Moncel\*

## INTRODUCTION

“The Durban conference in December 2011 marked a breakthrough in international efforts to combat climate change.”<sup>1</sup> It is in these terms that the European Commission (“EU”) Commissioner Connie Hedegaard described the 17<sup>th</sup> Conference of the Parties (“COP 17”) to the United Framework Convention on Climate Change (“UNFCCC” or “Convention”) and the seventh meeting of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (“CMP 7”), which took place this past winter in South Africa.<sup>2</sup>

In Durban, governments agreed to a package composed of three main elements: 1) a continuation of the Kyoto Protocol with a second round of quantified mitigation commitments to be defined for a subset of Annex I countries;<sup>3</sup> 2) operational decisions implementing the 2010 Cancun Agreements;<sup>4</sup> and 3) the launch of a process for a new international agreement by 2015 applicable to all Parties.<sup>5</sup> The Durban Package is the latest development in the climate regime: the constellation of international, national and sub-national institutions and actors with capacity, expertise and authority to address climate change. While some commentators expressed skepticism on this outcome,<sup>6</sup> the dominant view appears to be one of cautious – and at times enthusiastic – optimism, similar to the opinion expressed by Commissioner Hedegaard.<sup>7</sup>

However, several fundamental political and technical questions were left unanswered in Durban.<sup>8</sup> Because of disagreements, negotiators delayed decisions or used ambiguous wording to express political will.<sup>9</sup> Chief among these ambiguous phrases is “agreed outcome with legal force,” a phrase that seemed to serve as a compromise for the legal form of a future climate agreement during the final hours of the talks.<sup>10</sup> This article examines this emblematic formulation and other important considerations beyond legal form that were left unanswered or ambiguous.

Scholars have argued that regimes can evolve gradually and that small steps can have significant effects over time.<sup>11</sup> Borrowing the approach former U.S. Secretary of State Henry Kissinger, compromises on language may be a manifestation of “constructive ambiguity”<sup>12</sup> that would allow the climate regime to grow stronger incrementally.<sup>13</sup> While recognizing the benefits of an incremental approach, it is worth considering what growth is sufficient for the climate regime to be effective and whether such a threshold was secured in Durban. There is a risk that the Durban outcome in fact yielded *unconstructive ambiguity* in the sense that, by avoiding difficult, time-sensitive political questions today, negotiators may have missed the narrow window of opportunity that science suggests remains for limiting a

rise in global average temperature to two degrees Celsius above pre-industrial levels.<sup>14</sup> Thus, governments’ ambiguity may have de facto, and perhaps inadvertently, locked the world into a high emissions trajectory.

In that context, the purpose of this article is to evaluate the Durban outcome in terms of its ability to set the climate change regime on a path to limit the global average temperature rise to two degrees Celsius above pre-industrial levels.<sup>15</sup> Comprehensive descriptions of the outcome of the conference have been written elsewhere. Instead, this article focuses on some of the most central provisions of a Durban-created future international climate agreement intended to facilitate international cooperation in meeting scientifically driven mitigation goals.<sup>16</sup> Specifically, a review of key agreement provisions finds that, while it is premature to cast a definitive judgment on the success of the Durban conference, the adequacy of a global response to climate change remains unclear and presents cause for concern.

The article assesses three of the key issues under negotiation in Durban as an illustration of the phenomenon of unconstructive ambiguity: the legal form of a future agreement; national and global mitigation commitments; and equity. In the conclusion, the possible causes and implications of this outcome are discussed.

## THE LEGAL FORM OF A FUTURE CLIMATE AGREEMENT

The question of the legal form for a future climate agreement to complement or replace the Kyoto Protocol was central in the Durban negotiations in 2011.<sup>17</sup> Views diverge among scholars and advocates on whether voluntary or legally binding commitments lead to greater ambition and implementation of international commitments to reduce greenhouse gas (“GHG”) emissions by national governments.<sup>18</sup> The benefits of a legally-binding international agreement may include greater legal certainty, increased incentives for domestic implementation and compliance, opportunities for legal challenges, and additional leverage for civil society to hold their governments accountable.<sup>19</sup> By contrast, others argue that a voluntary framework would lead to greater participation and more ambitious goals.<sup>20</sup>

---

\*Remi Moncel is an Associate in the Climate and Energy Program at the World Resources Institute (“WRI”), a global environmental think tank. An expert on international climate policy, his work examines the role of various institutions and processes within and outside the UNFCCC in promoting collective action on climate change and effective policy implementation. This article reflects the views of the author alone and not those of WRI. The author is grateful to Paul Joffe, Kelly Levin and Jennifer Morgan for their helpful comments on earlier drafts.

In some ways, the Durban conference defied the odds with a decision that signals a move towards a “top-down”<sup>21</sup> climate regime after many had assumed that the regime would take a “bottom-up” form in the aftermath of the Copenhagen Accord<sup>22</sup> and the Cancun Agreements.<sup>23</sup> Several elements of the Durban outcome suggest a possible shift towards a more inclusive multilateral legal framework. However, ambiguous compromises in Durban limit the ability to know with certainty the structure of the future climate regime.

#### A REINVESTMENT IN MULTILATERALISM

The Durban Package<sup>24</sup> included an agreement to continue the Kyoto Protocol after its first commitment period, which ends in 2012.<sup>25</sup> The EU has agreed to a second commitment period.<sup>26</sup> Although the end date of this second commitment period remains to be negotiated,<sup>27</sup> a new set of mitigation commitments by the EU, and possibly other developed countries such as Norway, Switzerland, Australia and New Zealand, will begin on January 1, 2013.<sup>28</sup> Beyond 2012, however, critics correctly point out that, given the absence of involvement in this process from other developed countries like the United States, Canada, Russia, and Japan, and quantified commitments from developing countries, the Kyoto Protocol will only include commitments from countries representing at most fifteen to sixteen percent of global greenhouse gas emissions,<sup>29</sup> and is therefore inadequate.<sup>30</sup> However, there are several benefits to the continuation of the Kyoto Protocol. It preserves certain multilateral rules and institutions that can serve as models for the new climate agreement proposed for adoption by 2015, such as accounting rules, a compliance mechanism, emissions trading systems, and the Adaptation Fund.<sup>31</sup> Secondly, the EU restored some of the trust lost among countries by fulfilling a major demand of developing countries: the continuation of the Kyoto Protocol as a necessary condition for enhanced global action in any post-2012 climate regime.<sup>32</sup>

COP 17 also established the Ad-Hoc Working Group on the Durban Platform for Enhanced Action (“AWG-DPEA”) with a view toward developing “a protocol, another legal instrument, or an agreed outcome with legal force under the UNFCCC applicable to all Parties.”<sup>33</sup> This agreement is planned to be negotiated over the coming three years, to be adopted at COP 21 in 2015, and to “come into effect and be implemented from 2020.”<sup>34</sup> The agreement’s significance should not be underestimated. Although several countries in the months and years preceding COP 17 had expressed a desire to establish a single legal agreement applicable to all countries,<sup>35</sup> many developing countries maintained that the principle of common but differentiated responsibilities and respective capabilities required that developed countries be legally bound to reduce emissions under the Kyoto Protocol or an equivalent legal instrument that did not include similar commitments from developing countries.<sup>36</sup> Other countries, particularly the U.S., argued throughout 2011, and until the end of the conference, that the politics were not right for adopting such a roadmap.<sup>37</sup> The wording of Paragraph 2 of the decision establishing the Durban Platform creates a window of opportunity in 2015 to adopt a legally binding instrument,

such as new protocol under the Convention or an amendment to the Convention.<sup>38</sup> In fact, several developed and developing countries, as well as observers, interpret the Durban outcome as presaging a new legally binding instrument.<sup>39</sup> In addition, in the fall of 2011 and during the negotiations in Durban, the EU made clear that it would agree to a second commitment period of the Kyoto Protocol only if other countries adopted a roadmap toward a universal, legally binding agreement under the Convention applicable to all Parties.<sup>40</sup>

#### REMAINING AMBIGUITIES ON LEGAL FORM

Despite the noteworthy expressed willingness by some Parties to be bound by a common legal instrument beginning in 2020, the ambiguity of the carefully crafted phrase “agreed outcome with legal force” continues to hide diverging views about the legal form of this future agreement and the commitments it will contain. The terms “a protocol” and “another legal instrument” have a clear precedent in international climate law as both terms were used separately in the 1995 Berlin Mandate that led to the adoption of the Kyoto Protocol in 1997.<sup>41</sup> The two terms convey the notion that the agreement to be negotiated will have a legally binding form.<sup>42</sup> By contrast, the novel phrase “agreed outcome with legal force” has not been used in international climate law<sup>43</sup> and appears to be new to international law as well.<sup>44</sup> Since the meaning of the phrase is uncertain, the Durban outcome does not necessarily imply that the agreement set to be adopted in 2015 will be legally binding.

The formulation, “agreed outcome with legal force,” was the result of a compromise brokered by the EU and India.<sup>45</sup> While other countries also expressed views on this question, these two actors emerged in the final hours as the crucial deal makers.<sup>46</sup> The EU’s satisfaction was essential to secure a second commitment period to the Kyoto Protocol for developed countries.<sup>47</sup> India’s consent was necessary because it appeared to be the most steadfast in its refusal to commit to adopting an agreement of a legally binding nature in 2015.<sup>48</sup> This phrase allowed EU and India to return home without having crossed any “red lines.”<sup>49</sup> In a speech to the Indian Parliament after COP 17, Minister of State for Environment and Forests Jayanthi Natarajan conveyed that India continues to oppose a legally binding agreement that includes commitments for India.<sup>50</sup> She noted that “[s]ome parties led, in particular, by the EU pressed for a form of agreement that should be legally binding on all Parties.”<sup>51</sup> She added that “India cannot agree to a legally binding agreement for emissions reduction at this stage of our development” and that “the [Durban] decision allows India the necessary flexibility over the choice of appropriate legal form to be decided in future.”<sup>52</sup> The Minister’s insistence on wording that is different from “protocol” and “another legal instrument” suggests that she attributed a different meaning to the phrase “agreed outcome with legal force.”<sup>53</sup> Meanwhile, Commissioner Connie Hedegaard suggested that neither the EU nor India had overstepped its position when she stated that “[w]hile protecting our respective interests, we gave a bit of ground to get a good result for the global community.”<sup>54</sup>

Under the Durban decision, India seems to interpret a non-binding agreement, suggesting that the legal form of a future agreement actually remains to be negotiated. In the words of the Indian Minister:

The post 2020 arrangements, when finalized, may include some aspirational CoP decisions, binding CoP decisions, setting up of new institutions and bodies, and new protocols or other legal instruments as necessary to implement the decisions covering various issues with various degrees of bindingness as per domestic or international provisions of law under the Convention.<sup>55</sup>

Despite India's protest, it may be the case that the nation's concerns and priorities can be integrated into a legally binding agreement in 2015. India's priority is essentially one of equity and its ability to develop.<sup>56</sup> The way forward may lie in the design of a legally binding agreement that differentiates between developed and developing countries in the content of post-2020 commitments and allows India to articulate commitments consistent with its development and poverty eradication goals.

Another unresolved issue is the legal form of the *commitments* that countries will implement post 2020.<sup>57</sup> The Durban decision establishing the AWG-DPEA does not specify the legal form of the commitments that countries will take.<sup>58</sup> Rather, it merely notes that the new process "shall raise the level of ambition" and focus in part on "mitigation."<sup>59</sup> Even so, it is important to note that not all legally binding agreements contain legally binding commitments.<sup>60</sup> For example, the UNFCCC is a legally binding agreement whose commitments are not expressed in specific and obligatory terms.<sup>61</sup> Conversely, the Kyoto Protocol is a legally binding agreement with legally binding mitigation commitments applicable to developed countries but not developing countries, even though developing countries are also Parties.<sup>62</sup> Unlike in the Kyoto Protocol, Parties agreed that the future Durban-based agreement will be "applicable to all Parties;" it follows that if the commitments are mandatory and specific, they will be mandatory and specific for all countries.<sup>63</sup> But the possibility remains that the commitments could instead be voluntary for all countries. Despite this uncertainty, the launch of a new Ad-Hoc Working Group may be ambitiously read as Parties' intent to create new, legally binding commitments under the Convention and not replicate the framework established by the Cancun Agreements.<sup>64</sup>

## NATIONAL AND GLOBAL MITIGATION COMMITMENTS

Two important factors that underlie the effectiveness of the global response to climate change are: 1) the level of ambition of the commitments expressed by countries and 2) the institutions and procedures that will ensure transparency and accountability around these commitments. The Durban conference delivered the detailed rules called for in Cancun, equipping the UNFCCC to facilitate action on the part of all countries in a voluntary framework.<sup>65</sup> These provisions are somewhat helpful in that they launch a process to increase ambition and establish institutions and procedures to coordinate and review the actions of

countries.<sup>66</sup> However, the fact that negotiators delayed decisions on several important items is a cause for significant concern.

## UNCLEAR PROSPECTS FOR BRIDGING THE AMBITION GAP

The pledges made by countries under the Cancun Agreements<sup>67</sup> are, in aggregate, insufficient to meet the goal of limiting a global average temperature increase to two degrees Celsius above pre-industrial levels.<sup>68</sup> Facing this inadequacy, two fundamental questions consequently emerge: what options exist for bridging this gap and when will countries consider and adopt such options? The Durban decisions provided partial answers to these questions.

The acknowledgement of the gap of further GHG reduction pledges ("ambition") in the Durban decisions, and the establishment of processes to bridge it, may be seen as a reason for hope. Paragraph 7 of the Durban Platform decision establishes a "workplan on enhancing mitigation ambition" to explore options to close the ambition gap.<sup>69</sup> Governments and observers were invited to submit views about options to increase ambition, and the UNFCCC Secretariat will organize a workshop during the year 2012 to discuss these options.<sup>70</sup> In addition, at the insistence of the Alliance of Small Island States ("AOSIS"), the Cancun Agreements, as confirmed by COP 17 in Durban, decided to periodically review the adequacy of the long-term goal and aggregate steps taken by Parties to achieving it.<sup>71</sup> The first such review will begin in 2013 and conclude in 2015, as a new agreement under the AWG-DPEA is meant to be adopted.<sup>72</sup> This review thus constitutes an important lever to increase ambition over the medium term as it could trigger countries to take more ambitious action before 2020 and could determine the commitments that countries take post 2020 under the new international agreement.<sup>73</sup>

On a political level, another positive development in Durban was the emergence of a new coalition of countries supportive of ambition.<sup>74</sup> The EU, AOSIS, and the Least Developed Countries were most visibly in support of the Durban Package that was ultimately adopted.<sup>75</sup> This marks an important shift from previous years, in particular from the dynamics of Copenhagen, where the outcome was largely seen as the result of a deal between the United States, China, India, and Brazil.<sup>76</sup> The Cancun Agreements, while more widely supported, merely vindicated the contents of the Copenhagen Accord.<sup>77</sup> In Durban, the final outcome of the conference remained elusive until the very end, in part because the major players were still far apart.<sup>78</sup> In the final days of the conference, a more minimal version of the text emerged with softer language on the ambition gap and steps to bridge it.<sup>79</sup> It was at this point that the EU and the AOSIS allied to push back and instead support a text that clearly acknowledged the ambition gap, launched a process for bridging it, and set a date for adopting a new international agreement that would include all countries.<sup>80</sup> Several commentators attribute the results of the conference to this new alliance, the EU in particular.<sup>81</sup> It remains to be seen whether this coalition can be maintained but, if it is, the alliance could drive the climate regime towards increased ambition and a framework that supports the interests of pioneering countries, rather than a framework that



establishes a lowest common denominator for countries that are not ready to lead.

Despite these positive developments, several elements suggest that the most difficult political questions were simply postponed and that the prospect of meeting the two degree Celsius goal is dim. Despite the periodic review to be underway in 2013, negotiators were unable to conclude the specific scope of negotiations that will be subject to review.<sup>82</sup> In addition, countries were unable to reach agreement on a global mitigation goal or peak year, despite earlier discussion of these topics in Copenhagen and Cancun.<sup>83</sup> In Durban, negotiators once again postponed the decision for consideration at COP 18.<sup>84</sup> Further, some countries and observers fear that countries will not increase the level of ambition of their commitments until 2020, when the new agreement will enter into force.<sup>85</sup> The adoption of a work program for 2012 on options to increase ambition may be a sign that such steps could be taken sooner, but the actual results remain to be seen given the rapidly closing window for meeting the two degree Celsius goal.<sup>86</sup>

### IMPROVED BUT INSUFFICIENT TRANSPARENCY

On the mitigation front, one of the main achievements of the Durban talks was the adoption of guidelines and procedures for the regular reporting to the Convention and peer review of Parties' greenhouse gas emissions, mitigation actions, support provided, and support received.<sup>87</sup> The Copenhagen Accord in 2010 and COP16 in Cancun in 2011 together mark an important shift on the question of measurement, reporting, and verification ("MRV").<sup>88</sup> Those agreements established that developed and developing countries would produce regular reports that are subject to some form of international review.<sup>89</sup> In Durban, Parties made this new framework operational by adopting modalities for reporting and review to be applied to developed and developing countries.<sup>90</sup> Developed countries will submit their first biennial reports by January 2014 and developing countries will submit their first biennial update reports by December 2014.<sup>91</sup> These reports will be subject to a process of "international assessment and review" and "international consultations and analysis" for developed and developing countries respectively.<sup>92</sup>

The adequacy of these guidelines can be best assessed based on their end goals. First, an MRV framework can help countries better understand other countries' actions and gain confidence that all parties are living up to their commitments. Second, MRV can provide accountability.<sup>93</sup> Regular reporting and review of countries' emissions and actions intend to expose countries that are not fulfilling their commitments. In theory, the threat of being "named and shamed" provides an incentive to countries to comply with their obligations.<sup>94</sup> Third, an adequate MRV system would generate information that is sufficiently complete and comparable to enable an assessment of whether countries, in aggregate, are doing enough to stabilize greenhouse gas concentrations in the atmosphere at the levels needed to meet global mitigation goals.

However, the Durban decisions provide limited country accountability and aggregate accounting in practical terms.<sup>95</sup>

The Durban decisions give no explicit right to observers, such as nongovernmental organizations and representatives of the media, to attend or offer comments or questions during the sessions in which the reports of countries are discussed.<sup>96</sup> This will likely reduce the level of interest among civil society in these reports and consequently weaken the "name and shame" effect of the process.<sup>97</sup> Secondly, the information requested of countries in these guidelines is likely to be insufficient to enable an accurate assessment of the world's progress towards the two degree Celsius goal. This is due in part to the fact that many of the countries' pledges under the Cancun Agreements have special conditions associated with them and leave many assumptions unspecified.<sup>98</sup> For example, the EU and Australia have expressed their pledges as ranges, vowing to commit to the higher end of their range only in the context of a comprehensive climate agreement.<sup>99</sup> China indicated that it would reduce the emissions intensity of its economy by forty to fifty percent below 2005 levels by 2020, but has not specified base year emissions or GDP projections for the year 2020.<sup>100</sup> Developed countries put forward economy-wide emissions targets but, unlike the Kyoto Protocol, the Cancun Agreements do not specify in which sectors of their economies these countries will reduce emissions.<sup>101</sup> The United Nations Environment Programme ("UNEP") estimates that this uncertainty surrounding countries' pledges and the way in which they will be implemented will result in an emissions gap ranging from six to eleven giga tons CO<sub>2</sub> emissions ("GtCO<sub>2</sub>e") in 2020 compared to what is needed to have a likely chance of meeting the two degree goal.<sup>102</sup> The Durban decisions do call on developed countries to submit additional information about their pledges using a standardized template.<sup>103</sup> The UNFCCC Secretariat will also organize workshops to clarify the pledges of countries.<sup>104</sup> However, developing countries are not required to use a similar template.<sup>105</sup> In addition, the Durban decisions neither include an agreement on common accounting rules nor set up a process to agree to such rules.<sup>106</sup> The topic of common accounting rules has been hotly debated among negotiators.<sup>107</sup> The EU and the AOSIS in particular have been advocates for such rules, whereas the U.S. has resisted these demands.<sup>108</sup> In the end, the division was bridged through a paragraph with no real operational effect and which reduces the prospects of adoption of common accounting rules in the future.<sup>109</sup>

Common accounting rules are necessary to ensure that countries account for their emissions reductions and enhanced removals in a complete and standardized manner. One risk to integrity, for example, is that countries could use different multilateral or bilateral offset programs.<sup>110</sup> Without common accounting rules for these offsets, emission reductions could be counted multiple times.<sup>111</sup> UNEP estimates that such "double-counting" could result in an increase in emissions of up to 1.3 GtCO<sub>2</sub>e in 2020.<sup>112</sup>

### EQUITY

#### CONTEXT

The topic of equity has been among the most central and contentious in the climate negotiations since the adoption of the UNFCCC in 1992.<sup>113</sup> The Convention treaty enshrined

the notion of equity in Article 3.1 through the principle of “common but differentiated responsibilities and respective capabilities.”<sup>114</sup> Parties have since been at odds over how to interpret this principle.<sup>115</sup> The Intergovernmental Panel on Climate Change acknowledged that favoring certain proposals over others comes down to “a policy judgment.”<sup>116</sup> A major source of discord has thus been how to make this widely accepted principle operational.<sup>117</sup> Academics and policy analysts have written extensively on the topic of equity as it relates to climate change.<sup>118</sup> Until now, the debate has mostly centered on the way in which responsibilities for future emissions cuts among countries should be allocated.<sup>119</sup> Most proposals use countries’ capacity and responsibility for past emissions (also known as historical responsibility) as a basis for their reduction recommendations.<sup>120</sup> The following section examines how UNFCCC negotiators at the Durban conference have tackled the notion of equity. Though this central issue is one of the keys to unlocking other roadblocks, governments have made little progress until now on the way in which equity should be integrated into an international agreement.<sup>121</sup> The Durban decisions offer a window of opportunity to begin a dialogue on this question. But statements by negotiators reveal that views are still far apart and that much work will be needed to find common ground.

#### THE TREATMENT OF EQUITY IN DURBAN AND BEYOND

Progress on the question of ambition, which this article discussed above, will likely be closely tied to progress on the question of equity. In the lead-up to the Durban conference, the Government of India requested that three items be added to the provisional agenda of COP 17, one of which related to “equitable access to sustainable development.”<sup>122</sup> The submission states that “[t]he decisions at Cancun imply that the global goal of climate stabilization in terms of limiting the temperature rise to two degrees Celsius above pre-industrial levels should be preceded by a paradigm for equitable access to sustainable development.”<sup>123</sup> The essence of the Indian position, which has received support from other developing countries, is that UNFCCC Parties should reach agreement up-front on the way in which the future effort to reduce emissions will be allocated among countries.<sup>124</sup> Many developing countries fear that, without an explicit agreement on the way in which the global “carbon budget” will be divided, developing countries will not have sufficient flexibility to prioritize their development and poverty eradication goals.<sup>125</sup> These discussions have become relatively contentious because what India and its allies describe as a legitimate claim to fairness and development, some developed countries view as an effort on the part of the major emerging economies to escape the increasing responsibilities that come with economic growth and higher greenhouse gas emissions, or as a distraction at best.<sup>126</sup> In the end, Parties agreed at COP 17 to hold a workshop in 2012 on the topic of “equitable access to sustainable development.”<sup>127</sup>

In addition, the issue of equity was central to the discussions on the Durban Platform. In a departure from the approach taken under the Kyoto Protocol, developed countries insisted

that any future legally binding international agreement should include commitments from all countries, or at least the major economies, rather than commitments from developed countries only.<sup>128</sup> The United States, for example, conditioned its acceptance of a future legally binding climate agreement on the fact that commitments under this agreement should apply symmetrically to developed and developing countries.<sup>129</sup> The adoption of the decision on the Durban Platform suggests that a balance was struck between this demand and the concern expressed by India that any future agreement should reflect equity. It is striking that the word equity and the principle of “common but differentiated responsibilities and respective capabilities” are absent of the decision on the Durban Platform.<sup>130</sup> Some commentators have read this absence as the result of demands by some developed countries.<sup>131</sup> U.S. Climate Envoy Todd Stern reported that he did not want any terms used that could “be read by others to perpetuate [...] that firewall.”<sup>132</sup> The firewall is a term widely used to refer to the traditional sharp distinction under the UNFCCC and the Kyoto Protocol between the level of responsibility for future action of developed countries and developing countries.<sup>133</sup>

Meanwhile, Indian and Chinese negotiators have offered a different interpretation of the Durban Platform decision.<sup>134</sup> They believe that equity actually features in the text of the future climate agreement because Paragraph 2 states that the new agreement will be “under the United Nations Framework Convention on Climate Change. . . .”<sup>135</sup> These negotiators argue that this phrase ensures that a future agreement will respect the principles of the Convention, including the principle of common but differentiated responsibilities and respective capabilities.<sup>136</sup>

Future negotiations are therefore likely to focus less on *whether* equity will be a part of the future climate agreement, and more on *how* the principle of equity should be integrated in this agreement. Importantly, symmetry and equity are not necessarily mutually exclusive. There are ways to integrate the principles of common but differentiated responsibilities and equity into a legally binding agreement that includes mandatory commitments for all Parties. The U.S., for example, has argued that the content of future commitments could differ between developed and developing countries, as long as their legal character is identical.<sup>137</sup> Developed countries could commit to absolute economy-wide reductions in greenhouse gas emissions, while developing countries could commit to reducing emissions compared to a business as usual scenario or could commit to implementing certain climate policies. The way forward may therefore lie in identifying ways in which symmetry and equity can be made compatible. Better trust and understanding on equity are necessary to inform and ultimately adopt countries’ individual and collective mitigation commitments post 2020.

These examples show that the issue of equity will certainly remain central to the climate negotiations in the months and years to come. The Durban decisions, through carefully worded compromises, have postponed political decisions on equity that, however difficult, are necessary to make progress on other critical issues, including ambition. The silver lining may be the

workshop on equity called for under the Durban decisions. It has the potential to start an overdue dialogue on options for integrating equity in an international agreement on climate change in a way that reconciles Parties' varied needs and aspirations, as well as global mitigation goals.

## CONCLUSION

What did the Durban climate talks deliver? The examples reviewed in this article show that, on the most fundamental issues that will determine the effectiveness of global efforts to address climate change, the record is mixed. Parties did manage to achieve some incremental progress, at times defying the odds, which could signal a shift in the climate regime towards greater ambition.<sup>138</sup> But several of the delicate compromises struck on legal form, national and global mitigation commitments, and equity did not bridge cleavages on the most sensitive and fundamental political questions.<sup>139</sup>

To those who have followed the UNFCCC negotiations for some time, this diagnostic is familiar because it is reminiscent of previous meetings of the COP and CMP.<sup>140</sup> This result is also perhaps natural. After all, climate change is one of the most difficult environmental, economic and social issues of our time and the ongoing negotiations and deals serve to incrementally build a coordinated global response to this threat.<sup>141</sup> However, time is of the essence.<sup>142</sup> Further delays risk thwarting our ability to reach the stated two-degree Celsius goal.<sup>143</sup>

In conclusion, one may reflect on the causes and possible remedies for this misalignment between the urgency of the problem and the slow, limited, and incremental solutions that the international climate negotiations have been able to deliver until now. The problem can be seen as one of misalignment of politics and expectations. While the UNFCCC has long been seen as the main – and sometimes only – legitimate international body for dealing with climate change, the time may have come to redefine the roles of various actors in the broader climate regime.<sup>144</sup> This calls for focusing the UNFCCC on the essential functions it is best placed to fulfill. It also calls for catalyzing and assigning responsibility to other international initiatives, national governments, and local actors to play their part.

Climate change, despite its global dimensions, requires action at the national and sub-national level.<sup>145</sup> Critics of the UNFCCC will use this fact to argue that a bottom-up regime will create greater incentives for action. But rather than discount the UNFCCC, one should define a catalytic role for it. The UNFCCC arguably remains best placed to fulfill certain

fundamental functions. This may include setting international goals, tracking the individual and aggregate performance of countries to stay on track with those goals, balancing country interests in an equitable manner, and providing a legal framework that generates confidence that all countries will implement their commitments.<sup>146</sup> With regard to these functions, some of the outcomes of Durban were meaningful. The Durban decisions create a new window of opportunity for increasing ambition and securing a meaningful commitment to collective action in 2015 in a new international agreement.<sup>147</sup>

But it is true that the UNFCCC alone cannot deliver the level of global action needed. Efforts to generate greater ambition will be successful only if actions are taken to generate political support at the domestic level.<sup>148</sup> In many ways, the resolve of ministers and negotiators at the UNFCCC is a reflection of domestic political will. Issues such as national commitments to mitigation and public climate finance are driven by national political and economic agendas rather than international bargaining among governments.<sup>149</sup> The development and deployment of low-carbon technology also depends on the cooperation of many actors outside the U.N., including the private sector.<sup>150</sup> While the UNFCCC can inform, reflect, measure, and coordinate the actions of countries, the level of ambition of these actions and the adequacy of the new agreement that will be adopted in 2015 will be in large part determined by our ability to generate domestic political support for climate action.<sup>151</sup> Domestic and international institutions need to act in tandem and reinforce each other over time.

Other international initiatives can also complement the UNFCCC, including the United Nations Convention on Sustainable Development ("Rio + 20 Summit"), the World Trade Organization, the G20, the Montreal Protocol, the International Maritime Organization, the International Civil Aviation Organization, and bilateral initiatives.<sup>152</sup> Here again, the objective would not be to seek alternatives to the UNFCCC but to think more strategically about the defined roles that the UNFCCC, other international organizations, national governments, and sub-national actors can play to collectively achieve our common goal. The Durban conference opened a narrow window of opportunity for increasing ambition in time to meet the two degree goal. Unless we mobilize domestic constituencies and international institutions to generate sufficient political will, the odds are high that future climate meetings will be unable to unlock the ambiguities that persisted in Durban and we will miss our target goal.



## Endnotes: Unconstructive Ambiguity in the Durban Climate Deal of COP 17 / CMP 7

<sup>1</sup> Connie Hedegaard, *Climate Change: India a Constructive Force in Durban*, THE ECON. TIMES (Jan. 29, 2012), [http://articles.economictimes.indiatimes.com/2012-01-09/news/30607496\\_1\\_climate-change-eu-and-india-connie-hedegaard](http://articles.economictimes.indiatimes.com/2012-01-09/news/30607496_1_climate-change-eu-and-india-connie-hedegaard).

<sup>2</sup> *Id.*

<sup>3</sup> See UNFCCC, Draft Dec. -/CMP/7, *Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol*, 16th Sess., (Advance Unedited Version).



## Endnotes: INTRODUCTORY REMARKS

continued from page 5

<sup>15</sup> See *The Global Climate Change Regime*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/climate-change/global-climate-change-regime/p21831> (last updated November 21, 2011); see generally REDD+ *Social & Environmental Standards Factsheet*, REDD+SES, <http://www.redd-standards.org/> (last visited Apr. 2, 2012).

<sup>16</sup> See U.N. Research Inst. for Social Dev., *The Global Political Economy of REDD+: Engaging Social Dimensions in the Emerging Green Economy*, 7-10 (Dec. 2011) (Rocio Hiraldo and Thomas Tanner).

<sup>17</sup> See *Id.* at 1-3, 7-11; see also UNEP Finance Initiative, *REDDy Set Grow, Part 1: A briefing for financial institutions: Opportunities and roles for financial institutions in forest carbon markets*, 28-30 (May 2011), [www.unepfi.org/fileadmin/documents/reddysetgrow.pdf](http://www.unepfi.org/fileadmin/documents/reddysetgrow.pdf).

<sup>18</sup> See CLIMATE ACTION NETWORK-INT'L, CAN-I SUBMISSION ON A NEW MARKET-BASED MECHANISM (March 2012), <http://unfccc.int/resource/docs/2012/smsn/ngo/176.pdf>; see generally Forum for Env't, *supra* note 4, at 8-10.

<sup>19</sup> See CLIMATE ACTION NETWORK-INT'L, VIEWS ON OPTIONS AND WAYS TO FURTHER INCREASE THE LEVEL OF AMBITION 10 (March 5, 2012), <http://climatenetwork.org/publication/can-submission-views-options-and-ways-further-increase-level-ambition-february-2012>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Robin Lancaster, *Ready, Steady, Go: The Partnership for Market Readiness is Sowing the Seeds for Carbon Trading in Several Developing Countries*, CARBON TRADING Feb. 2012, at 16, [http://issuu.com/carbon-tradingmagazine/docs/carbon\\_trading\\_february\\_2012-1](http://issuu.com/carbon-tradingmagazine/docs/carbon_trading_february_2012-1).

<sup>23</sup> See *About the Partnership for Market Readiness (PMR)*, THE WORLD BANK CARBON FIN. UNIT, <http://wbcarbonfinance.org/Router.cfm?Page=PMR&FID=61218&ItemID=61218&ft=About> (last visited Apr. 2, 2012).

<sup>24</sup> See *Durban Conference Delivers Breakthrough in International Community's Response to Climate Change*, UNITED NATIONS, <http://www.un.org/wcm/content/site/climatechange/pages/gateway/the-negotiations/durban> (last visited Apr. 2, 2012); see generally United Nations Framework Convention on Climate Change, Draft Dec. -/CP-17, *Conference of the Parties, Green Climate Fund-Report of the Transitional Committee*, 17th Sess., Nov. 28-Dec. 9, 2011, U.N. Doc. FCCC/CP/2011/L.9 (Dec. 10, 2011), [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cop17\\_gcf.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_gcf.pdf).

<sup>25</sup> See Ernst & Young, *Durban dynamics: navigating for progress on climate change*, 1-15, <http://www.ey.com/ZA/en/Newsroom/News-releases/2011—Press-Release—November—Ernst—Young-report-indicates-possible-US-45-billion-climate-change-funding-gap-ahead-of-COP-17> (last visited Apr. 2, 2012) (discussing financial aspects of climate change from a global perspective).

<sup>26</sup> See Forum for Env't, *supra* note 4, at 8-11.

<sup>27</sup> See CAN-International submission on how to address drivers of deforestation and forest degradation, Climate Action Network-International (Feb. 20, 2012), <http://www.climatenetwork.org/publication/can-submission-how-address-drivers-deforestation-and-forest-degradation-feb-2012> (discussing measures necessary for REDD+ to succeed, including both domestic and international factors).

<sup>28</sup> See Daniel Michaels, *EU's Airline-Emissions Fees Face Challenge*, THE WALL STREET JOURNAL (Feb. 16, 2010 1:10 PM), <http://online.wsj.com/article/SB10001424052970204059804577227173526305492.html>; see generally UK Environment Agency, *EU Emissions Trading System – Aviation*, <http://www.environment-agency.gov.uk/business/topics/pollution/107596.aspx> (last updated March 23, 2012).

## Endnotes: UNCONSTRUCTIVE AMBIGUITY IN THE DURBAN CLIMATE DEAL OF COP 17 / CMP 7

continued from page 11

<sup>4</sup> The two most notable decisions implementing the Cancun Agreements were the decision launching the Green Climate Fund and the decision on many operational modalities that were under discussion on the Ad-Hoc Working Group on Long-Term Cooperative Action ("AWG-LCA"). See UNFCCC, Draft Dec. -/CP-17, *Conference of the Parties, Green Climate Fund-Report of the Transitional Committee*, 17th Sess., Nov. 28-Dec. 9, 2011, U.N. Doc. FCCC/CP/2011/L.9 (Dec. 10, 2011); UNFCCC, Draft Dec. -/CP/17, *Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (Advance Unedited Version), [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cop17\\_lcaoutcome.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_lcaoutcome.pdf).

<sup>5</sup> UNFCCC, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, U.N. Doc. FCCC/CP/2011/L.10 (Dec. 10, 2011).

<sup>6</sup> See Janet Redman, *Durban's Climate Debacle*, FOREIGN POL'Y IN FOCUS (Jan. 5, 2012), [http://www.fpif.org/articles/durbans\\_climate\\_debacle; Politicians Listen to the Polluters at UN Climate Talks](http://www.fpif.org/articles/durbans_climate_debacle; Politicians Listen to the Polluters at UN Climate Talks), GREENPEACE INT'L (Dec. 11, 2011), <http://www.greenpeace.org/international/en/news/features/Politicians-Listen-to-the-Polluters-at-UN-climate-talks/>.

<sup>7</sup> Nina Chestnet & Jon Herskovitz, *UN Climate Talks Reach Modest Deal*, REUTERS (Dec. 11, 2011), <http://www.reuters.com/article/2011/12/11/us-climate-idUSTRE7B41NH20111211>.

<sup>8</sup> See John M. Broder, *In Glare of Climate Talks, Taking on Too Great a Task*, N.Y. TIMES (Dec. 10, 2011), <http://www.nytimes.com/2011/12/11/science/earth/climate-change-expands-far-beyond-an-environmental-issue.html>; Fitriani Adriansyah, *Mixed Results from Durban Climate Talks for Indonesia*, THE JAKARTA POST (Dec. 16, 2011), <http://www.thejakartapost.com/news/2011/12/16/mixed-results-durban-climate-talks-indonesia.html>; David Crossland, *The Durban Climate Agreement is Almost Useless*, SPIEGEL ONLINE INT'L (Dec. 12, 2011), <http://www.spiegel.de/international/world/0,1518,803158,00.html>.

<sup>9</sup> See Broder, *supra* note 8; Crossland, *supra* note 8.

<sup>10</sup> UNFCCC, Draft Dec. -/CP-17, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action* (Advance Unedited Version), [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cop17\\_durbanplatform.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf).

<sup>11</sup> See, e.g., DANIEL BODANSKY & ELLIOT DIRINGER, THE PEW CENTER ON GLOBAL CLIMATE CHANGE, *THE EVOLUTION OF MULTILATERAL REGIMES* (2010) (explaining

the reasons international regimes often develop in an evolutionary manner); K. Levin et al., *Playing it Forward: Path Dependency, Progressive Incrementalism, and the "Super Wicked" Problem of Global Climate Change*, 6 IOP CONF. SERIES: EARTH AND ENVTL. SCI. 502002 (2009).

<sup>12</sup> The expression "constructive ambiguity" is generally attributed to Henry Kissinger and is widely used in the field of diplomacy. It has been defined as "the deliberate use of ambiguous language on a sensitive issue in order to advance some political purpose." See G. R. Berridge & Alan James, *A Dictionary of Diplomacy* (July 21, 2008), [http://grberridge.diplomacy.edu/dict\\_comp\\_a\\_e.htm](http://grberridge.diplomacy.edu/dict_comp_a_e.htm).

<sup>13</sup> See HE Patricia Espinosa, Sec'y of Foreign Affairs, Mex., Address at the Chatham House: From Cancun to Durban: Implications for Climate and Multilateral Diplomacy (June 30, 2011), <http://www.chathamhouse.org/sites/default/files/300611espinosa.pdf>.

<sup>14</sup> Scientific estimates indicate that emission pathways consistent with a "likely" chance (i.e. greater than sixty-six percent) of meeting the two degree Celsius goal "generally peak before 2020, have emission levels in 2020 around 44 GtCO<sub>2</sub>e (range: 39-44 GtCO<sub>2</sub>e), have steep emission reductions afterwards and/or reach negative emissions in the longer term." See UNEP, *THE EMISSIONS GAP REPORT: ARE THE COPENHAGEN ACCORD PLEDGES SUFFICIENT TO LIMIT GLOBAL WARMING TO 2° C OR 1.5°?* (Nov. 2010), [http://www.unep.org/publications/ebooks/emissionsgapreport/pdfs/EMISSIONS\\_GAP\\_TECHNICAL\\_SUMMARY.pdf](http://www.unep.org/publications/ebooks/emissionsgapreport/pdfs/EMISSIONS_GAP_TECHNICAL_SUMMARY.pdf).

<sup>15</sup> See *id.* (noting the concern revealed in the recent UN reports regarding the difficulty maintaining the average temperature rise within two degrees Celsius).

<sup>16</sup> See *Summary of the Durban Climate Change Conference*, EARTH NEGOTIATIONS BULL. (Dec. 2011), <http://www.iisd.ca/download/pdf/enb12534e.pdf>; Wolfgang Sterk et al., *On the Road Again: Progressive Countries Score Realpolitik Victory in Durban While the Real Climate Continues to Heat Up*, WUPPERTAL INST. FOR CLIMATE, ENV'T AND ENERGY (Dec. 13, 2011), [http://www.wupperinst.org/uploads/tx\\_wibeitrag/COP17-report.pdf](http://www.wupperinst.org/uploads/tx_wibeitrag/COP17-report.pdf); Edward Cameron & Jennifer Morgan, *Reflections on COP 17 in Durban*, WRI INSIGHTS (Dec. 16, 2011), <http://insights.wri.org/news/2011/12/reflections-cop-17-durban>.

<sup>17</sup> See Remi Moncel et al., *Building the Climate Change Regime: Survey and Analysis of Approaches* (World Resources Inst., Working Paper, 2011), at 53, available at [http://www.unep.org/PDF/PressReleases/UNEP-WRI\\_BuildingClimateRegime\\_ADVANCED.pdf](http://www.unep.org/PDF/PressReleases/UNEP-WRI_BuildingClimateRegime_ADVANCED.pdf).



<sup>18</sup> See *id.*

<sup>19</sup> See MARY ROBINSON FOUND., HIGHLIGHTS FROM MEETING ON POSSIBLE LEGAL FORM OF A NEW CLIMATE AGREEMENT, [http://www.mrfcj.org/pdf/Highlights\\_from\\_MRFCJ\\_Meeting\\_on\\_Possible\\_Form\\_of\\_a\\_New\\_Climate\\_Agreement.pdf](http://www.mrfcj.org/pdf/Highlights_from_MRFCJ_Meeting_on_Possible_Form_of_a_New_Climate_Agreement.pdf) (last visited Apr. 6, 2012).

<sup>20</sup> See *id.*

<sup>21</sup> A top-down climate regime typically refers to a regime in which a global agreement, generally of a legally binding nature, governs international cooperation among countries to reduce greenhouse gas emissions by setting commitments for each country in such a way as to meet, in aggregate, a mutually agreed and scientifically driven global reduction goal. By contrast, a bottom-up system generally refers to a more loosely structured regime in which an international agreement that is not legally binding contains voluntary pledges that each country puts forward unilaterally. See Daniel Bodansky, *A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime*, 43 ARIZ. ST. L.J. 697 (2011).

<sup>22</sup> See UNFCCC Dec. 2/CP.15, *Report of the Conference of the Parties*, 15th Sess., Dec. 7-9, 2009, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

<sup>23</sup> See UNFCCC Dec. 1/CP.16, *Report of the Conference of the Parties*, 16th Sess., Nov. 29-Dec. 10, 2010, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter *Cancun*]; UNFCCC Dec. 1/CMP.6, *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol*, 6th Sess., Nov. 29-Dec. 10, 2010, U.N. Doc. FCCC/KP/CMP/2010/12/Add.1 (Mar. 15, 2011).

<sup>24</sup> On the final day of the conference, Ms. Maite Nkoana-Mashabane, Minister of International Relations and Co-operation of the Republic of South Africa proposed for adoption during a final stocktaking plenary the “Durban Package” composed of a second commitment of the Kyoto Protocol, decisions on the implementation of the Cancun Agreements, and a decision on the Durban Platform for Enhanced Action. See Sergio Abranches, *The Durban Package Begins to Take Shape*, ECOPOLITY (Dec. 8, 2011), <http://www.ecopolity.com/2011/12/08/the-durban-agreement-begins-to-take-shape/>.

<sup>25</sup> See E3G.ORG, E3G BRIEFING - THE DURBAN PACKAGE 1 (2011), [http://www.e3g.org/images/uploads/E3G\\_Briefing\\_Durban\\_Package\\_2011.pdf](http://www.e3g.org/images/uploads/E3G_Briefing_Durban_Package_2011.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> UNFCCC Draft decision, *supra* note 3 (Paragraph 1 notes that the second commitment period will extend to either 2017 or 2020. The end date of the second commitment period will be negotiated over the coming months and agreed to at the seventeenth session).

<sup>28</sup> See Daniel Bodansky, *W[h]ither the Kyoto Protocol? Durban and Beyond*, HARV. PROJECT ON CLIMATE AGREEMENTS (Aug. 2011), [http://belfercenter.ksg.harvard.edu/publication/21314/whither\\_the\\_kyoto\\_protocol\\_durban\\_and\\_beyond.html](http://belfercenter.ksg.harvard.edu/publication/21314/whither_the_kyoto_protocol_durban_and_beyond.html)

<sup>29</sup> Estimates based on 2008 data. See *Climate Analysis Indicators Tool*, WORLD RESOURCES INST. (2011), <http://cait.wri.org/>.

<sup>30</sup> See Eileen Claussen & Catherine N. Stratton, *Climate Change and Kyoto: Where We Are and Where We Are Going*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS (Oct. 6, 1999), <http://www.c2es.org/press-center/speeches/climate-change-and-kyoto-where-we-are-and-where-we-are-going>.

<sup>31</sup> See Bodansky, *supra* note 28; Laea Medley, *Kyoto Protocol Lives On*, DAILY NEWS (Dec. 12, 2011), <http://www.iol.co.za/dailynews/kyoto-protocol-lives-on-1.1196449>.

<sup>32</sup> Submission on Shared Vision by India on behalf of the African Group, Argentina, Brazil, China, India, Iran, Lebanon, Malaysia, Philippines, Thailand and Uruguay, U.N. Doc. FCCC/AWGLCA/2011/CRP.5 (2011).

<sup>33</sup> UNFCCC Dec. -/CP/17, *supra* note 3.

<sup>34</sup> *Id.*

<sup>35</sup> See Remi Moncel et al., *Summary of UNFCCC Submissions* (World Resources Inst., Working Paper, 2009), [http://pdf.wri.org/working\\_papers/unfccc\\_submissions\\_summary\\_2009-10-29.pdf](http://pdf.wri.org/working_papers/unfccc_submissions_summary_2009-10-29.pdf).

<sup>36</sup> Statement on Behalf of the Group of 77 and China by H.E. Ambassador Mr. Alberto Pedro D'Alotto, Vice Minister of Foreign Affairs of Argentina, At the Joint High-Level Segment of the Seventeenth Session of the Conference of the Parties of the Climate Change Convention and the Seventeenth Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol (Dec. 6, 2011), <http://www.g77.org/statement/getstatement.php?id=111206a>.

<sup>37</sup> See Press Release, United States Special Envoy for Climate Change Todd Stern, Talk and Action: the Role of International Negotiations in Addressing the Climate Challenge (Apr. 21, 2011), <http://www.state.gov/s/climate/releases/168098.htm>.

<sup>38</sup> See Dan Bodansky, *The Negotiations that Would Not Die*, OPINIO JURIS (Dec. 11, 2011, 10:28 AM), <http://opiniojuris.org/2011/12/11/the-negotiations-that-would-not-die/>.

<sup>39</sup> See Briefing, United States Special Envoy for Climate Change Todd Stern (Dec. 13, 2011), <http://iipdigital.usembassy.gov/st/english/texttrans/2011/12/20111213184856su0.2956965.html#axzz1oqsapcl6>; Fiona Harvey, *Ex-UN Climate Chief Says Business Should Get Ready for Low-Carbon World*, THE GUARDIAN (Jan. 5, 2012), <http://www.guardian.co.uk/environment/2012/jan/05/business-must-get-ready-for-low-carbon-world>; Michael Jacobs, *Climate Policy*, NATURE (Jan. 12, 2012), <http://www.nature.com/nature/journal/v481/n7380/full/481137a.html>; T. Jayaraman, *Post-Durban, India has its Task Cut Out*, THE HINDU (Dec. 20, 2011), <http://www.thehindu.com/opinion/lead/article2729539.ece>; Mary Robinson, *Robinson Welcomes Durban Roadmap on How to Ensure Climate Justice*, IRISH TIMES (Dec. 12, 2011), <http://www.irishtimes.com/newspaper/world/2011/12/12/1224308953706.html>; *Winners and losers in the Durban climate deal*, OXFAM (Dec. 12, 2011), <http://www.oxfam.org.uk/applications/blogs/pressoffice/2011/12/14/winners-and-losers-in-the-durban-climate-deal/>.

<sup>40</sup> See Connie Hedegaard, European Comm'r for Climate Action, Statement at the Opening of the High-Level Segment of COP 17 (June 12, 2011), [http://ec.europa.eu/commission\\_2010-2014/hedegaard/headlines/news/2011-12-06\\_01\\_en.htm](http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2011-12-06_01_en.htm).

<sup>41</sup> See UNFCCC Dec. 1/CP.1, *Report of the Conference of the Parties*, 1st Sess., Mar. 28-Apr. 7, 1995, U.N. Doc. FCCC/CP/1995/7/Add.1 (June 6, 1995) [hereinafter *Berlin*].

<sup>42</sup> See Jacob Werksman, *Q & A: the Legal Aspects of the Durban Platform Text*, WRI INSIGHTS (Dec. 14, 2011), <http://insights.wri.org/news/2011/12/qa-legal-aspects-durban-platform-text>.

<sup>43</sup> See *id.* At COP 13 in Bali, Parties to the UNFCCC agreed to adopt by 2009 “an agreed outcome.” The ambiguity around the meaning of this phrase has led to intense negotiations to this day on the legal form of the agreement that will conclude the work plan launched in Bali. Werksman also notes that the “Convention speaks of legally binding instruments such as protocols and amendments as ‘entering into force’ when they become binding on Parties.” He also argues that “[i]n the context of the Durban Platform negotiations, this choice of words seems to signal something different, and softer, than a legal instrument requiring ratification.”

<sup>44</sup> See Dan Bodansky, *Evaluating Durban*, THE ENERGY COLLECTIVE (Dec. 13, 2011), <http://theenergycollective.com/seidel/72295/evaluating-durban>.

<sup>45</sup> See Werksman, *supra* note 42.

<sup>46</sup> See *id.*

<sup>47</sup> See Umi Goswami, *Durban Climate Summit: Let's Agree to Put in Place New Global Deal*, THE ECON. TIMES (Dec. 15, 2011), [http://articles.economicstimes.indiatimes.com/2011-12-15/news/30520541\\_1\\_second-commitment-period-kyoto-protocol-emission-cuts](http://articles.economicstimes.indiatimes.com/2011-12-15/news/30520541_1_second-commitment-period-kyoto-protocol-emission-cuts).

<sup>48</sup> In the months leading up to the Durban conference, a growing number of countries coalesced around a proposal to adopt a roadmap in Durban to work towards a legally binding agreement under the Convention to complement or replace the Kyoto Protocol. The main countries in opposition were Brazil, India and China. The United States, although theoretically open to signing up to such agreement as long as it included all major economies, was also believed to be skeptical and expressed several times its belief that such a decision was not ripe for Durban. In the final hours of the conference, China, Brazil and the United States expressed openness to the proposal and did not object when the South African Presidency formally submitted it to Parties for approval. See also Lavanya Rajamani, *Legal Form and the Future of the Kyoto Protocol: Can Durban Deliver?*, CLIMATE & DEV. KNOWLEDGE NETWORK (Nov. 2011), <http://cdkn.org/2011/11/legal-form-and-the-future-of-the-kyoto-protocol-can-durban-deliver/>.

<sup>49</sup> See Goswami, *supra* note 47 (explaining the “red line” as the “[c]ommon but differentiated responsibility” which India has “stressed on differentiations between developed and developing countries as a function of the industrialized world’s historical responsibility for global warming); Lavanya Rajamani, *Deconstructing Durban*, THE INDIAN EXPRESS (Dec. 15, 2011), <http://www.indianexpress.com/news/deconstructing-durban/887892>.

<sup>50</sup> Press Release, India Minister of State for Environment Minister of State for Env't and Forests Shrimati Jayanthi Natarajan, *Suo Moto Statement in Lok Sabha by Minister of State for Environment and Forecasts on Durban Agreements* (Dec. 16, 2011), <http://pib.nic.in/newsite/erelease.aspx?relid=78811> [hereinafter *Natarajan*].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (The phrase “allows India the necessary flexibility over the choice of appropriate legal form to be decided in future. This choice will be guided by [India’s] national development imperatives and the principles of the Convention.”)

- <sup>54</sup> Hedegaard, *supra* note 1.
- <sup>55</sup> Natarajan, *supra* note 50.
- <sup>56</sup> See COP 17: *India to Champion Equity and Access to Sustainable Development in Durban*, THE CLIMATE GROUP (Nov. 23, 2011), <http://www.theclimategroup.org/our-news/news/2011/11/23/cop17-india-to-champion-equity-and-access-to-sustainable-development-in-durban/> (describing India's intention to clarify the meaning of "equity" left undefined in the Cancun Agreements by pushing for a 'facilitative intellectual property right regime', linking equity with access to sustainable development.")
- <sup>57</sup> See Jacob Weksman, *Law and Disorder: Will the Issue of Legal Character Make or Break a Global Deal on Climate?*, 3 CLIMATE POL'Y 672-77 (July 2010). Weksman distills the concept of legal character into four components: the legal form of the agreement; the legal form of the commitments within the agreement; the specific and prescriptive nature of these commitments; and the institutions and procedures designed to hold parties accountable for these commitments.
- <sup>58</sup> See *id.*; Alex Lenferna, *COP17: Nothing to Celebrate*, THOUGHT LEADER (Dec. 13, 2011), <http://www.thoughtleader.co.za/mandelarahodesscholars/2011/12/13/cop17/> (noting that various interpretations may arise).
- <sup>59</sup> UNFCCC Dec. -/CP/17, *supra* note 3.
- <sup>60</sup> See *id.* (explaining "countries regularly enter into agreements that take a legally binding form but that contain 'commitments' that are softly worded or highly contingent.")
- <sup>61</sup> See *id.* (noting the UNFCCC is an example of a "soft law" approach with no formal status).
- <sup>62</sup> See *id.* (noting a tension between an insistence by developed countries on "legal symmetry" and an equally strong demand by developing countries for "legal differentiation" which has allowed for this difference in the Kyoto Protocol).
- <sup>63</sup> See *Berlin*, *supra* note 41, ¶ 2(b) (excluding the adoption of quantified mitigation commitments for developing countries and stating that the new agreement will "not introduce any new commitments for Parties not included in Annex I . . .")
- <sup>64</sup> See Weksman, *supra* note 42.
- <sup>65</sup> See UNFCCC Dec. -/CP/17, *supra* note 3; *Cancun*, *supra* note 23, at ¶ 80.
- <sup>66</sup> See UNFCCC Dec. -/CP/17, *supra* note 3.
- <sup>67</sup> Compilation of Information on Nationally Appropriate Mitigation Actions to be Implemented by Parties Not Included in Annex I to the Convention, UNFCCC U.N. Doc. FCCC/AWGLCA/2011/INF.1 (Mar 18, 2011), <http://unfccc.int/resource/docs/2011/awglca14/eng/inf01.pdf>.
- <sup>68</sup> See UNEP, *supra* note 14.
- <sup>69</sup> UNFCCC Dec. -/CP/17, *supra* note 3.
- <sup>70</sup> See Moncel, *Building the Climate Change Regime: Survey and Analysis of Approaches*, *supra* note 17. For examples of options to increase ambition within the UNFCCC.
- <sup>71</sup> See, *supra*, *Cancun*, note 23, paras. 4.138–140; UNFCCC Draft dec. -/CP/17, *supra* note 4, at paras. 157–67.
- <sup>72</sup> UNFCCC Draft dec. -/CP/17, *supra* note 4 at para. 6.
- <sup>73</sup> See Kelly Levin & Remi Moncel, *Ambition in the Durban Climate Deal*, WRI INSIGHTS (Feb. 13, 2012), <http://insights.wri.org/news/2012/02/ambition-durban-climate-deal>.
- <sup>74</sup> See, e.g., *Common Statement by the European Union, Least Developed Countries and Association of Small Island States*, EUROPEAN COMMISSION (Dec. 9, 2011), available at [http://ec.europa.eu/commission\\_2010-2014/hedegaard/headlines/news/2011-12-09\\_01\\_en.htm](http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2011-12-09_01_en.htm).
- <sup>75</sup> See Jeff Tollefson, *Durban Maps Path to Climate Treaty*, NATURE (Dec. 13, 2011), <http://www.nature.com/news/durban-maps-path-to-climate-treaty-1.9635>.
- <sup>76</sup> Tobias Rapp, Christian Schwagerl & Gerald Trautetter, *Copenhagen Protocol: How China and India Sabotaged the UN Climate Summit*, SPIEGEL ONLINE (May 5, 2010), <http://www.spiegel.de/international/world/0,1518,692861-2,00.html>.
- <sup>77</sup> See, e.g., *Report of the Environmental Regulation Commission*, 32 Energy L. J. 637, 654-55 (2011).
- <sup>78</sup> See Louise Gray, *Durban Climate Change: Last Minute Talks Produce 'Historic Deal to Save the Planet'*, TELEGRAPH (Dec. 11, 2011), <http://www.telegraph.co.uk/earth/environment/climatechange/8948920/Durban-climate-change-last-minute-talks-produce-historic-deal-to-save-the-planet.html>.
- <sup>79</sup> See *id.*
- <sup>80</sup> Charlie Dunmore, *Durban Talks a Victory for Europe's Climate Chief*, REUTERS (Dec. 13, 2011), <http://www.reuters.com/article/2011/12/13/us-eu-climate-hedegaard-idUSTRE7BC1N20111213>.
- <sup>81</sup> See Jayaraman, *supra* note 39; Oxfam, *supra* note 39.
- <sup>82</sup> Cameron & Morgan, *supra* note 16.
- <sup>83</sup> See Levin & Moncell, *supra* note 73.
- <sup>84</sup> UNFCCC Draft Dec. -/CP/17, *supra* note 4, at paras. 1-2.
- <sup>85</sup> See, e.g., *Parliamentary Briefing: Outcomes of 2011 UN Climate Talks, Durban, South Africa*, World Wildlife Fund U.K. (Jan. 10, 2012) ("[T]he decision to postpone entry into force until 2020 is an unacceptable delay.").
- <sup>86</sup> See UNEP, *supra* note 14.
- <sup>87</sup> UNFCCC Draft Dec. -/CP/17, *supra* note 4, at paras. 5-44; see Kelly Levin & Remi Moncel, *Transparency and Accountability (MRV) in the Durban Climate Deal*, WRI INSIGHTS (Feb. 13, 2012), <http://insights.wri.org/news/2012/02/transparency-and-accountability-mrv-durban-climate-deal> for a more detailed discussion of the content and implications of the Durban decisions with regard to transparency.
- <sup>88</sup> See Andrew Light, *The Cancun Compromise: Masterful Diplomacy Ends with Agreement*, CENTER FOR AM. PROGRESS (Dec. 13, 2010), [http://www.americanprogress.org/issues/2010/12/cancun\\_compromise.html](http://www.americanprogress.org/issues/2010/12/cancun_compromise.html).
- <sup>89</sup> See *id.*
- <sup>90</sup> See Levin & Moncell, *supra* note 79.
- <sup>91</sup> See *id.*
- <sup>92</sup> See *id.*
- <sup>93</sup> See *id.*
- <sup>94</sup> See Dean Kuipers, *Progress at the End of Durban COP17 Climate Talks*, L.A. TIMES (Dec. 12, 2011), <http://articles.latimes.com/2011/dec/12/local/la-me-gs-progress-at-end-of-durban-cop17-climate-talks-20111212> ("It's the fact that [Parties] have other issues on which they want to deal with each other, and the name-and-shame aspect that will push countries to at least negotiate," according to Jake Schmidt, International Climate Policy Director for Natural Resources Defense Council).
- <sup>95</sup> Compare UNFCCC Draft Dec. -/CP/17, *supra* note 4, with UNFCCC, Dec. 1/CP.13, Conference of the Parties, 13th Sess., Dec. 3-15, 2007, para. 11, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).
- <sup>96</sup> See *id.*
- <sup>97</sup> See Org. for Econ. Co-Operation and Dev., *Design Options for International Assessment and Review (IAR) and International Consultations and Analysis (ICA)*, U.N. Doc. COM/ENV/EPOC/IEA/SLT(2011) 4 (Nov. 17, 2011) (analyzing mechanisms in other regimes which allows stakeholders to contribute to or observe the review process).
- <sup>98</sup> See Taryn Fransen & Jennifer Hatch, *GHG-Framed Mitigation Actions by Developing Countries* (World Resources Inst., Working Paper, June 2011), [http://pdf.wri.org/working\\_papers/ghg\\_framed\\_mitigation\\_actions\\_by\\_developing\\_countries.pdf](http://pdf.wri.org/working_papers/ghg_framed_mitigation_actions_by_developing_countries.pdf); Levin et al., *Remedying Discord in the Accord: Accounting Rules for Annex I Pledges in a Post-2012 Climate Agreement* (World Resources Inst., Working Paper, Nov. 2010), [http://pdf.wri.org/working\\_papers/remedying\\_discord\\_in\\_the\\_accord.pdf](http://pdf.wri.org/working_papers/remedying_discord_in_the_accord.pdf).
- <sup>99</sup> See *Strategy on Climate Change for 2020 and Beyond*, EUROPA (Aug. 31, 2011), [http://europa.eu/legislation\\_summaries/energy/european\\_energy\\_policy/128188\\_en.htm](http://europa.eu/legislation_summaries/energy/european_energy_policy/128188_en.htm); Australian Government, *Australia's National Emissions Target: Fact Sheet* (Dec. 2008).
- <sup>100</sup> See *China Announces Targets on Carbon Emission Cuts*, CHINA VIEW (Nov. 26, 2009), [http://news.xinhuanet.com/english/2009-11/26/content\\_12544181.htm](http://news.xinhuanet.com/english/2009-11/26/content_12544181.htm).
- <sup>101</sup> See Levin & Moncell, *supra* note 73.
- <sup>102</sup> See UNEP, *supra* note 14.
- <sup>103</sup> See Cameron & Morgan, *supra* note 16.
- <sup>104</sup> UNFCCC Draft Dec. -/CP/17, *supra* note 4, at para. 5.
- <sup>105</sup> Kelly Levin & Jared Finnegan, *Assessing Non-Annex I Pledges: Building a Case for Clarification* (World Resources Inst., Working Paper, Dec. 2011), [http://pdf.wri.org/working\\_papers/assessing\\_non\\_annex\\_i\\_pledges.pdf](http://pdf.wri.org/working_papers/assessing_non_annex_i_pledges.pdf).
- <sup>106</sup> Kelly Levin & Remi Moncel, *Transparency and Accountability (MRV) in the Durban Climate Deal*, *supra* note 88.
- <sup>107</sup> Ad Hoc Working Group On Long-Term Cooperative Action Under the Convention, Fourteenth Session: Work of the AWG-LCA Contact Group, Nationally Appropriate Mitigation Commitments or Actions by Developed Country Parties (Oct. 14, 2011) (possible elements of draft decision for adoption of the guidelines for biennial reports of developed country Parties), [http://unfccc.int/files/bodies/awg-lca/application/pdf/revised\\_co-facilitators\\_summary\\_3.2.2.pdf](http://unfccc.int/files/bodies/awg-lca/application/pdf/revised_co-facilitators_summary_3.2.2.pdf) (paras. 4, 5bis, 5ter).
- <sup>108</sup> See *United Nations Climate Change Conference in Durban: 28 November-9 December 2011: A Brief History of the UNFCCC and Kyoto Protocol*, EARTH NEGOTIATIONS BULL., 2 (Dec. 1, 2011), <http://www.iisd.ca/climate/cop17/compilation.pdf>.
- <sup>109</sup> Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UNFCCC Draft Dec. -/CP/17

(advance unedited version), [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cop17\\_lcaoutcome.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_lcaoutcome.pdf) (para. 9) (“Acknowledges the value of information, and the need to elaborate rigorous, robust and transparent approaches in a systematic manner to measure progress towards the achievement of economy-wide emission reduction targets, building on existing processes, practices and experiences.”).

<sup>110</sup> Levin et al., *Remedying Discord in the Accord: Accounting Rules for Annex I Pledges in a Post-2012 Climate Agreement*, *supra* note 99.

<sup>111</sup> *Id.*

<sup>112</sup> See UNEP, *supra* note 14.

<sup>113</sup> See generally Benito Muller, *Equity in Climate Change: The Great Divide* (2002), [http://www.oxfordclimatepolicy.org/publications/documents/The\\_Great\\_Divide-Executive\\_Summary.pdf](http://www.oxfordclimatepolicy.org/publications/documents/The_Great_Divide-Executive_Summary.pdf) (discussing equity as a point of contention posing problems for bringing developing countries on board for agreements to mitigate climate change).

<sup>114</sup> United Nations Framework Convention on Climate Change art. 3.1, Mar. 24, 1994, 1771 U.N.T.S. 107, [http://unfccc.int/essential\\_background/convention/background/items/1355.php](http://unfccc.int/essential_background/convention/background/items/1355.php)

<sup>115</sup> See, e.g., Douglas Bushey & Sikina Jinnah, *Evolving Responsibility? The Principal of Common but Differentiated Responsibility in the UNFCCC*, 6 BERKELEY J. INT’L L. PUBLICIST 1, 1 (2010), <http://bjil.typepad.com/Publicist/06-Bushey-Jinnah-final.pdf> (“At their core, the United Nations Framework Convention on Climate Change (UNFCCC) negotiations can be understood as a series of attempts to operationalize the international legal principle of ‘common but differentiated responsibilities.’”).

<sup>116</sup> U.N. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SECOND ASSESSMENT SYNTHESIS OF SCIENTIFIC-TECHNICAL INFORMATION RELEVANT TO INTERPRETING ARTICLE 2 OF THE UN FRAMEWORK CONVENTION ON CLIMATE CHANGE 48 (1995), <http://www.ipcc.ch/pdf/climate-changes-1995/ipcc-2nd-assessment/2nd-assessment-en.pdf> (“The IPCC can clarify scientifically the implications of different approaches and proposals, but the choice of particular proposals is a policy judgment.”).

<sup>117</sup> Bushey & Jinnah, *supra* note 116, at 9 (discussing the “persistent puzzle” of operationalizing the concept of “common but differentiated responsibilities”).

<sup>118</sup> See, e.g., EDWARD A. PAGE, CLIMATE CHANGE, JUSTICE AND FUTURE GENERATIONS 17-18 (2006) (discussing 21st Century concerns with equity in climate change mitigation); Aaditya Matoo & Arvind Subramanian, *Equity in Climate Change: An Analytical Review* 5-11 (The World Bank Dev. Research Grp. Trade and Integration Team, Working Paper No. 5383, 2010) (discussing four common proposals for allocating emissions to promote equity); Cameron, “HUMAN RIGHTS AND CLIMATE CHANGE”; Winkler and Beaumont, “Fair and effective multilateralism in the post-Copenhagen climate negotiations.”

<sup>119</sup> See generally Kevin Baumert et al., *Great Expectations: Can International Emissions Trading Deliver an Equitable Climate Regime?* 3 CLIMATE POL’Y 137 (2002), <http://ethree.com/downloads/Climate%20Change%20Readings/International%20Climate%20Policy/Baumert%20-%20Great%20Expectations%20Emission%20Trading%20Equitable.pdf> (discussing the allocation of emission rights among countries as an equity debate).

<sup>120</sup> Remi Moncel et al., *Building the Climate Change Regime: Survey and Analysis of Approaches* 41-46 (U.N.E.P. World Resources Institute, Working Paper, 2011).

<sup>121</sup> Baumbert, *supra* note 120, at 139 (discussing the failure of governments to address long-term agreements on international trade).

<sup>122</sup> The other requested additions related to technology transfer and unilateral trade measures. U.N. Framework Convention on Climate Change, Proposals by India for Inclusion of additional agenda items in the provisional agenda of the seventeenth session of the Conference of the Parties 2 (2011), <http://re.indiaenvironmentportal.org.in/files/file/india%20cop.pdf>.

<sup>123</sup> *Id.* at 2.

<sup>124</sup> See generally *id.*

<sup>125</sup> Prabir Purkayastha & Tirthakankar Manda, *A Note on Carbon Space as Development Space*, in CONFERENCE ON GLOBAL CARBON BUDGETS AND EQUITY IN CLIMATE CHANGE 18, 18 (Tata Institute of Social Science & Ministry of Environment & Forests eds., 2010), <http://moef.nic.in/downloads/public-information/tiss-conference-cc-2010.pdf> (“The developed countries are arguing that countries such as India should work out a low carbon low energy path.”).

<sup>126</sup> See U.S. DEP’T OF STATE, TODD STERN’S BRIEFING ON THE U.N. CLIMATE CHANGE CONFERENCE (Dec. 13, 2011), <http://iipdigital.usembassy.gov/st/english/texttrans/2011/12/20111213184856su0.2956965.html#axzz1oqsapcl6> (describing the idea of equity as a distraction).

<sup>127</sup> Kelly Levin & Remi Moncel, *Ambition in The Durban Climate Deal*, WRI INSIGHTS (February 13, 2012), <http://insights.wri.org/news/2012/02/>

ambition-durban-climate-deal (“At the request of India, Parties at COP17 decided to organize a workshop in 2012 on “equitable access to sustainable development,” which will focus on this important question.”).

<sup>128</sup> See, e.g., DANIEL BODANSKY, BELFER CENTER FOR SCIENCE AND INTERNATIONAL AFFAIRS, W[H]ITHER THE KYOTO PROTOCOL? DURBAN AND BEYOND 4 (2011), [http://belfercenter.ksg.harvard.edu/files/Bodansky\\_Viewpoint-Final.pdf](http://belfercenter.ksg.harvard.edu/files/Bodansky_Viewpoint-Final.pdf) (“The United States would be willing to negotiate a legally-binding agreement, but only if the mandate provided that the agreement would apply with equal legal force to all of the major emitters (including China and India). Although it accepts that developing country commitments should be differentiated from those of developed countries as to content, it insists on symmetry of legal form, meaning that the provisions for major-emitting developing and developed countries should have the same legal character.”).

<sup>129</sup> *Id.*

<sup>130</sup> See United Nations Framework Convention on Climate Change, Conference of the Parties Seventeenth Session, Durban, S. Afr., Nov. 28-Dec. 9, 2011, *Establishment of an Ad-Hoc Working Group on the Durban Platform for Enhanced Action*, FCCC/CP/2011/L.10 (Dec. 10, 2011).

<sup>131</sup> Lavayna Rajamani, *Deconstructing Durban*, THE INDIAN EXPRESS (Dec. 15, 2011), <http://www.indianexpress.com/news/deconstructing-durban/887892/0>.

<sup>132</sup> Stern, *supra* note 127.

<sup>133</sup> See, e.g., Bodansky, *supra* note 131, at 4 (“They insist on maintaining the Kyoto ‘firewall’ between developed countries (which have emissions limitation commitments), and developing countries (which don’t).”).

<sup>134</sup> See, e.g., Lisa Friedman, *NATIONS: Top China climate negotiator says Durban talks did not resolve Kyoto issues* NEWS ON-DEMAND (Jan. 12, 2012), [http://us.vocuspr.com/ViewNewsOnDemandStrict.aspx?Preview=true&ArticleID=525773\\_19970\\_11834414](http://us.vocuspr.com/ViewNewsOnDemandStrict.aspx?Preview=true&ArticleID=525773_19970_11834414) (“The [Chinese] interpretation is starkly different from that of U.S. negotiators.”).

<sup>135</sup> *Id.* (“Su, speaking yesterday on the sidelines of a World Resources Institute (WRI) event in Washington, D.C., said the implicit in the reference ‘under the convention’ is an embrace of all the convention’s principles, including that of common but differentiated responsibilities.”).

<sup>136</sup> *Id.*; Shrimati Jayanthi Natarajan, Minister of State for Environment and Forests, Suo Moto Statement in Lok Sabha by Minister of State for Environment and Forests (I/C) on Durban Agreements (Dec. 16, 2011), <http://pib.nic.in/newsite/PrintRelease.aspx>.

<sup>137</sup> Department of State, Office of Electronic Information, *Remarks As Prepared by Todd Stern, Special Envoy for Climate Change at the MIT Earth Week Colloquium in Boston*, STATE.GOV (April 21, 2011), <http://www.state.gov/s/climate/releases/168098.htm> (“But there are multiple problems with [the firewall paradigm]. First, though I’ll spare you the details here, it is wrong as a matter of textual analysis; the Framework Convention – the foundational treaty for climate – never created a firewall.”).

<sup>138</sup> Jennifer Morgan & Edward Cameron, *Reflections on COP 17 in Durban* WRI INSIGHTS (Dec. 16, 2011), <http://insights.wri.org/news/2011/12/reflections-cop-17-durban> (“Overall, the Durban outcome is mixed, but provides elements of a strong foundation to build upon as long as countries continue to push for short-term ambition and to move toward low-carbon development.”).

<sup>139</sup> See generally *id.*

<sup>140</sup> See, e.g., *id.*

<sup>141</sup> Council on Foreign Relations, *The Global Climate Change Regime*, CFR.ORG (Nov. 21, 2011), <http://www.cfr.org/climate-change/global-climate-change-regime/p21831> (explaining that while some countries are making progress in meeting Kyoto targets, there are not enough commitments).

<sup>142</sup> Michael Jacobs, *The World is Running Out of Time* TAIPEI TIMES (Dec. 5, 2011), <http://www.taipeitimes.com/News/editorials/archives/2011/12/05/2003519952> (relaying the message from multiple agencies that there are only a few years left to make significant changes to mitigate climate change).

<sup>143</sup> See, e.g., *id.* (describing the timeframe for making significant changes to mitigate the worst effects of climate change).

<sup>144</sup> See, e.g., Council on Foreign Relations, *supra* note 142 (“This will require a variety of flexible partnerships among national, bilateral, and multilateral actors, and a combination of short-term and long-term strategies.”).

<sup>145</sup> See *Territorial Approach to Climate Change*, <http://www.uncclern.org/tacc> (last visited Mar. 11, 2012) (describing the different roles played by actors at different levels of government).

<sup>146</sup> DEBORAH BLEVISS ET AL., A NEW ROLE FOR THE UNFCCC: THE MATCHMAKER OF GLOBAL CLIMATE GOVERNANCE 30-31 (2011), <http://www.globalutmaning.se/wp-content/uploads/2011/09/A-NEW-ROLE-for-UNFCCC-Final.pdf> (describing the role that remains for the UNFCCC).



<sup>147</sup> Morgan & Cameron, *supra* note 139 (giving an optimistic report of COP 17, saying that while there was much work to be done, things are moving in the right direction).

<sup>148</sup> *Territorial Approach to Climate Change*, *supra* note 146 (“Climate change mitigation and adaptation requires concerted action at multiple levels and by different actors.”).

<sup>149</sup> CENTER FOR AMERICAN PROGRESS, *BREAKING THROUGH ON TECHNOLOGY: OVERCOMING THE BARRIERS TO THE DEVELOPMENT AND WIDE DEPLOYMENT OF LOW CARBON TECHNOLOGY* 19 (2009), [http://www.americanprogress.org/issues/2009/07/pdf/gcn\\_report.pdf](http://www.americanprogress.org/issues/2009/07/pdf/gcn_report.pdf) (discussing the private sector as the solution to innovation barriers).

<sup>150</sup> *Id.*

<sup>151</sup> Morgan & Cameron, *supra* note 139 (“Tackling climate change will be a multi-generational effort requiring sustained political engagement and a complete transition to a low-carbon economy.”).

<sup>152</sup> See generally DANIEL BODANSKY, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, *MULTILATERAL CLIMATE EFFORTS BEYOND THE UNFCCC* (2011), <http://www.c2es.org/publications/multilateral-climate-efforts-beyond-unfccc> (setting forth a series of regimes touching on the subject of climate change).

---

## Endnotes: WHAT LITIGATION OF A CLIMATE NUISANCE SUIT MIGHT LOOK LIKE

*continued from page 14*

<sup>18</sup> See JAN PAUL ACTON & LLOYD S. DIXON, INST. FOR CIV. JUSTICE, *RAND CORP., SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS* (2002), <http://www.rand.org/content/dam/rand/pubs/reports/2007/R4132.pdf> (finding on average that transaction costs were 88% of total expenditures; individual expenditures ranged from 80% to 96%).

<sup>19</sup> 28 U.S.C. § 1407 (2006) (codifying the establishment of multidistrict litigation).

<sup>20</sup> Alien Tort Statute, 28 U.S.C. § 1350 (2006). *But see* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that, in establishing a valid Alien Tort Statute,

“courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized”); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (imposing liability on corporations for violations of customary international law “has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se” and would therefore not meet the requirements of *Sosa*).

---

## Endnotes: AN UN-CONVENTIONAL APPROACH: ECUADOR’S YASUNÍ-ITT INITIATIVE IS IN DISCORD WITH THE UNFCCC

*continued from page 18*

<sup>63</sup> COAL. FOR RAINFOREST NATIONS, <http://www.rainforestcoalition.org> (last visited Apr. 20, 2012).

<sup>64</sup> Abate, *supra* note 60, at 97 (citing *About REDD+, UN-REDD Programme*, UN-REDD.ORG, <http://www.un-redd.org/AboutREDD/tabid/582/language/en-US/Default.aspx> (last visited Apr. 20, 2012)).

<sup>65</sup> Bali Delegates Agree to Support Forests-for-climate (REDD) Plan, MONGABAY.COM (Dec. 16, 2007), <http://news.mongabay.com/2007/1215-redd.html>.

<sup>66</sup> *Id.*

<sup>67</sup> See generally, United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries Sixth Policy Board Meeting, Mar. 21-22, *National Programme Document – Ecuador*, U.N.R.E.D.D./PB6/2011/V/1 (Feb. 28, 2011).

<sup>68</sup> *Id.* at 2.

<sup>69</sup> *Id.* at 69-74.

<sup>70</sup> *Id.* at 2.

<sup>71</sup> *Id.* at 41.

<sup>72</sup> *Id.* at 43.

<sup>73</sup> See *infra*, notes 14 – 17. (The proposal does not mention REDD+, and proposes a compensation system predicated on the market value of the foregone oil, rather than the benefits of deforestation and reduction in greenhouse gas emissions.).

<sup>74</sup> Davis, *supra* note 8, at 247 (citing Lucas, *supra* note 6).

<sup>75</sup> See PAUL VARGHESE, THE ENERGY AND RES. INST., *AN OVERVIEW OF REDD, REDD PLUS AND REDD READINESS AT INTERNATIONAL CONFERENCE ON COMMUNITY RIGHTS, FORESTS AND CLIMATE CHANGE* (2009).

---

## Endnotes: THE EAST AFRICAN COMMUNITY AND THE CLIMATE CHANGE AGENDA: AN INVENTORY OF THE PROGRESS, HURDLES, AND PROSPECTS

*continued from page 24*

<sup>6</sup> See generally Rene N’Guettia Kouassi, *The Itinerary of the African Integration Progress: an Overview of the Historical Landmarks*, 1(2) AFR. INTEGRATION REV. 1 (2007), <http://www.africa-union.org/root/ua/Newsletter/EA/Vol.%201.%20No.%202/Kouassi.pdf>.

<sup>7</sup> See *EAC Treaty*, *supra* note 5, art. 2.

<sup>8</sup> *EAC Treaty*, *supra* note 5, art. 5(2)(a),(c),(g).

<sup>9</sup> *Id.* art. 3.

<sup>10</sup> See generally East African Community Protocol on Environment and Natural Resources Management, Nov. 30, 2006, (not in force), [http://www.eac.int/environment/index.php?option=com\\_content&view=article&id=122:eac-gender-a-community-development-framework&catid=3:key-documents](http://www.eac.int/environment/index.php?option=com_content&view=article&id=122:eac-gender-a-community-development-framework&catid=3:key-documents) (The Protocol has been ratified by all EAC Partner States, save for Tanzania) [hereinafter *Environment & NRM Protocol*].

<sup>11</sup> See generally EAST AFRICAN COMMUNITY [EAC], *DEEPENING AND ACCELERATING INTEGRATION*, EAC DEV. STRATEGY (2011/2012 – 2015/2016) (Aug. 2011), [http://www.eac.int/advisory-opinions/doc\\_download/650-4th-eac-development-strategy.html](http://www.eac.int/advisory-opinions/doc_download/650-4th-eac-development-strategy.html).

<sup>12</sup> EAC, *EAC DEVELOPMENT STRATEGY* (2011/12 – 2015/16) 17 (2011), [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQFjAA&url=http%3A%2F%2Fwww.eac.int%2Fadvisory-opinions%2Fdoc\\_download%2F650-4th-eac-development-strategy](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQFjAA&url=http%3A%2F%2Fwww.eac.int%2Fadvisory-opinions%2Fdoc_download%2F650-4th-eac-development-strategy).

[html&ei=pVFqT4ODDqGQ0gG\\_nv2fDw&usg=AFQjCNHg29isyEL68ZUNY0GuVzTKNoxBkA&sig2=5TrZlnAjPA0Xi6gxZ5g\\_Jg](http://www.eac.int/advisory-opinions/doc_download/650-4th-eac-development-strategy.html&ei=pVFqT4ODDqGQ0gG_nv2fDw&usg=AFQjCNHg29isyEL68ZUNY0GuVzTKNoxBkA&sig2=5TrZlnAjPA0Xi6gxZ5g_Jg) [hereinafter *EAC DEVELOPMENT STRATEGY*].

<sup>13</sup> DIODORUS BUBERWA KAMALA, *THE ACHIEVEMENTS AND CHALLENGES OF THE NEW EAST AFRICAN COMMUNITY CO-OPERATION 3* (2006), <http://www2.hull.ac.uk/hubs/pdf/memorandum58.pdf>.

<sup>14</sup> See generally PETER COOPER, WALKER INST., *EVIDENCE-BASED ADAPTATION TO CLIMATE CHANGE IN EAST AFRICA: COMPLEXITIES, CHALLENGES AND OPPORTUNITIES* (2012), [http://www.walker-institute.ac.uk/events/seminars/Cooper%20Reading%20Seminar%20\(feb.%201st\).pdf](http://www.walker-institute.ac.uk/events/seminars/Cooper%20Reading%20Seminar%20(feb.%201st).pdf).

<sup>15</sup> Baruti Katembo, *Pan Africanism and Development: The EAC Model*, 2 PAN AFR. STUDIES no. 4 107, 109 (2008), [http://www.jpanafrican.com/docs/vol2no4/2.4\\_Pan\\_Africanism.pdf](http://www.jpanafrican.com/docs/vol2no4/2.4_Pan_Africanism.pdf).

<sup>16</sup> Mothae Maruping, *Challenges for Regional Integration in Sub-Saharan Africa: Macroeconomic Convergence & Monetary Coordination*, in *AFRICA IN THE WORLD ECONOMY - THE NATIONAL, REGIONAL AND INTERNATIONAL CHALLENGES* 137 (2005), <http://www.fondad.org/uploaded/Africa%20in%20the%20World%20Economy/Fondad-AfricaWorld-Chapter11.pdf>.

<sup>17</sup> *History of the EAC*, EAC, <http://www.eac.int/about-eac/eac-history.html?showall=1> (last visited March 23, 2012).

<sup>18</sup> *Id.*